Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78- 78-770

ARTHUR S. CURTIS, *Petitioner*

v.

FRANK S. PHILLIPS, INC., ET AL., *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the District of Columbia Court of Appeals entered in this proceeding on May 31, 1978.

OPINION BELOW

The opinion of the District of Columbia Court of Appeals, unreported, appears in Appendix A attached. The opinion of the Superior Court of the District of Columbia, also unreported, appears in Appendix B attached.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered May 31, 1978. A timely petition for rehearing *en banc* was denied August 8, 1978. This

petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

1. Whether the District of Columbia Court of Appeals was free to disregard the District of Columbia common law.

2. Whether the District of Columbia Court of Appeals, in affirming the judgment below and deciding factual questions and inferences against the petitioner, denied the petitioner his Seventh Amendment right to have factual questions determined by a jury.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the Rules of the common law." The Constitution of the United States, Amendment 7, U.S.C.A. Const. Amend. 6-12 696 (1972).

District Of Columbia Code Annotated § 11-102

"§ 11-102 Status of District of Columbia Court of Appeals: The highest court for the District of Columbia is the District of Columbia Court of Appeals. Final judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code. (July 29, 1970, Pub. L. 91-358, § 111, title I, 84 Stat. 475.)"

STATEMENT OF CASE

This action was brought to recover damages for personal injuries suffered by petitioner when he stepped through an open elevator door in the lobby of a downtown Washington, D.C. office building and fell to the bottom of the elevator shaft. The owner and manager of the office building were sued. At the conclusion of a five-day trial, the jury returned a verdict for petitioner in the amount of $2,340.00. Petitioner filed a Motion for New Trial which was denied by the trial court. Petitioner then appealed to the District of Columbia Court of Appeals.

At the trial the Court originally instructed the jury that mental anguish was a compensable item of damages. The Court subsequently ruled, however, that the record contained no evidence of mental anguish or emotional distress, and therefore told the jury to disregard the earlier instruction. In affirming the judgment below the appellate panel concluded that the only evidence of emotional distress was petitioner's testimony that when he regained consciousness after the fall he thought he was dead; that this fear was only petitioner's reaction to the emotional shock of the accident; and that it was not the type of emotional distress which results from a substantial physical injury.

A petition for rehearing *en banc* on the issue of emotional distress was later denied by the District of Columbia Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. The District of Columbia Court of Appeals Decided an Important District of Columbia Question Contrary to the Established Rule of Common Law

The rule in the District of Columbia is that mental anguish is compensable where it results from a sub-

stantial physical injury. A plaintiff cannot recover for mental anguish caused solely by the emotional shock of an accident. *See Hamilan Corporation* v. *O'Neill*, 106 U.S. App. D.C. 354, 273 F.2d 89 (1959) (allowing the recovery) and *Brown* v. *Potomac Electric Power Company*, 236 F.Supp. 815 (D.D.C. 1964) (recognizing the rule but denying recovery).

There is no question that petitioner suffered substantial physical injuries. He was knocked unconscious; he suffered a dislocation and fracture of the right shoulder; and he received multiple abrasions to both legs, the left knee and buttocks.

Certainly some of petitioner's mental anguish was traceable to the substantial physical injuries he received. When petitioner regained consciousness he feared his right arm was severed and did not know it was intact until he moved the fingers of his right hand. Petitioner began experiencing intense pain from his injuries when he arrived at the hospital emergency room. The pain was so great he felt he could not stand it and he feared that he would be dead unless his personal physician administered to him at once.

The petitioner's mental anxiety—for his condition and for the fear he had for his very life—was traceable to the severity of his injuries.

2. The Superior Court of the District of Columbia in Denying Plaintiff's Motion for New Trial, and the District of Columbia Court of Appeals in Affirming the Judgment Below, Decided Factual Questions and Inferences Against the Petitioner and Thereby Violated His Constitutional Right to a Jury Trial

The record contains evidence of emotional distress other than petitioner's testimony that he thought he had been killed. Extracts from petitioner's testimony at trial appear below:

Extracts	*Transcript*
"... so I took the arm with my left arm, and I put it on my right leg, and I moved the fingers, and I said, well—I thought to myself—I still have my arm—"	279, 280
"And I looked up, and way at the top I saw a dim light and I realized that the elevator was on the fourth floor. And my next thought was, if he comes down, he will cut me in half."	280
"I had no treatment. I sat there until the pain began to come so strongly that I felt I couldn't stand it, and I asked for a sedative, and they said they couldn't give it."	283
"After I called Doctor Hersmark, Doctor Hersmark came with his car, and I asked him to please take me away from there or I would be dead."	283, 284
"One thing was that I was so sore, where I had fallen, that I couldn't sit and I couldn't stand for any more than two or three minutes at a time. I couldn't sit. I couldn't sleep, and I couldn't stand.	284

In summary, the record contains evidence that petitioner thought he had been killed by the fall; that he thought his right arm was missing or paralyzed; that he thought the elevator would descend and cut him in

half; and that the pain was so great he felt he could not stand it and that he would die unless given immediate treatment.

In concluding that the only evidence of petitioner's emotional distress was his testimony that he thought he had been killed, the District of Columbia Court of Appeals decided factual questions and inferences against petitioner. Therefore, the District of Columbia Court of Appeals denied petitioner his Constitutional right to have debatable factual questions determined by a jury. *International Terminal Operating Co.* v. *N. V. Nederl. A. Merk. Stoomv. MATTS*, 393 U.S. 74 (1968); *Atlantic & Gulf Stevedores, Inc.* v. *Ellerman Lines*, 369 U.S. 355 (1962); *Galloway* v. *United States*, 319 U.S. 372 (1943); *Baylis* v. *Travelers' Insurance Co.*, 113 U.S. 316 (1885).

CONCLUSION

The record presents the type of emotional distress which results from substantial physical injury. A writ of certiorari should be issued to review the judgment and opinion of the District of Columbia Court of Appeals in order to secure a result in line with the rule permitting recovery for mental anguish traceable to a substantial physical injury.

Respectfully submitted,

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APPENDIX

APPENDIX A

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 12380

JANUARY TERM, 1978

ARTHUR S. CURTIS, *Appellant*

v.

FRANK S. PHILLIPS, INC., ET AL., *Appellees.*

CA 539-74

Appeal from the Superior Court of the
District of Columbia Civil Division

filed May 31, 1978

(Hon. Fred L. McIntyre, Trial Judge)

(Argued April 6, 1978 Decided May 31, 1978)

BEFORE: KELLY, NEBEKER and YEAGLEY, Associate Judges.

Memorandum Opinion and Judgment

Appellant brought this action to recover for personal injuries sustained when he fell down the elevator shaft in a building owned by appellees. On Sunday, December 1, 1968, appellant was on his way to his office on the fourth floor of the Franklin Building. As he entered the lobby of the building, he saw that the outside elevator door was open. He stepped through the door, not realizing that the elevator was not there and fell to the bottom of the elevator shaft.

Appellant was knocked unconscious by the fall. When he regained consciousness, he thought that he had been killed and that his right arm was missing. He looked up the shaft and saw the elevator car above him.

Appellant's screams attracted the attention of another tenant who called the Fire Department. The ambulance squad removed appellant from the elevator shaft and took him to the George Washington University Hospital Emergency Room. His legs and buttocks were severely bruised and a large swelling had appeared on his left knee.

Before appellant could be treated by hospital personnel, he called his personal physician who picked appellant up at the hospital and took him by car to his medical office. An examination of appellant disclosed a dislocation and fracture of the right shoulder, and bruises to the right arm and thigh, and the left knee.

At trial, appellant testified that he was treated until May 1969. During this period, appellant received heat, ultra sound and massage treatments. The doctor examined appellant on September 9, 1969 but did not see him again until January 26, 1972. In November 1975, the doctor retired and appellant was referred to a second physician. Under his care and supervision, appellant received physiotherapy treatment. There was medical testimony that the injuries caused traumatic arthritis to the right shoulder which was a permanent condition and it restricted the movement of the shoulder and arm. There also was testimony that in 1958 the plaintiff had been injured in an automobile accident as a result of which he suffered traumatic arthritis involving the cervical spine, left shoulder and back.

Appellant testified that the cost of treatment and related expenses had been $708 for the first doctor, $1,635 for the second doctor, $50 for medication and $400 for transportation.

At the conclusion of the trial, the jury returned a verdict for appellant in the amount of $2,340. Appellant filed a motion for a new trial on the grounds that the jury award was (a) the product of erroneous instructions, and (b) legally inadequate, inconsistent and contrary to law. The

motion was denied on April 23, 1977. This appeal is from the denial of that motion.

We consider first appellant's claim that the trial court erred in denying his request that one member of the jury panel be removed for cause. During voir dire, a member of the jury panel stated that she had worked for an insurance company as a bodily injury claims adjuster from 1966 to 1968. In response to questions by appellee's counsel, the panel member said that she did not have any preconceived ideas which would preclude her from reaching a just verdict based on the evidence. The court denied appellant's request that this panel member be stricken for cause.

It is well established that the qualification of jurors is a matter peculiarly for the determination of the trial court. *Wilburn v. United States,* D.C.App., 340 A.2d 810, 812 (1975). A trial court's determination that a juror was not biased will be reversed only if shown to be clearly erroneous. *D.C. Transit System, Inc. v. Slingland,* 105 U.S. App.D.C. 264, 266 F.2d 465, *cert. denied,* 361 U.S. 819 (1959). In this case, appellant has not shown that the determination of the trial court was clearly erroneous.

Appellant's next claim relates to the mitigation of damages instruction given by the trial court. The court instructed the jury as follows:

> Also, you, the jury, are instructed that the plaintiff, following his injuries, has the duty to mitigate his damages wherever possible.
>
> By this the Court means that a person may not sit idly by and allow damages to grow and then seek to collect them in a money judgment.

In this jurisdiction, a plaintiff has a duty to do all reasonably within his power to mitigate damages. *Parking Management Inc. v. Jacobson,* D.C.App., 257 A.2d 479, 481 (1969). A failure on the part of the plaintiff to avoid damage by doing what an ordinary and prudent man would do

precludes him from recovering that amount from the defendant. *Id.* In this case, the instruction given by the trial court required that appellant minimize damages "wherever possible." Appellant contends that this instruction required that he do more than what an ordinary and prudent man would do to avoid further damage, and was therefore erroneous.

When the trial court informed the parties of its intention to give the mitigation instruction, appellant objected. He did not, however, specifically object to the use of the term "wherever possible," in the mitigation instruction. Hence, under Super. Ct. Civ. R. 51, appellant is precluded from raising the issue.

Appellant also claims that the trial court erred in instructing the jury that it could not award him compensation for mental anguish or emotional distress. The trial court originally instructed the jury that mental anguish was a compensable item of damages. The court subsequently ruled, however, that the record was devoid of evidence showing mental anguish or emotional distress, and therefore told the jury to disregard the earlier instruction.

It is well settled in this jurisdiction that there cannot be recovery for negligently caused mental disturbance or emotional distress which is not traceable to a substantial physical injury. *Hamilan Corp. v. O'Neill,* 106 U.S.App.D.C. 354, 273 F.2d 89 (1959). A plaintiff may not recover for mental pain or suffering caused solely by the emotional shock of an accident. In this case, the only evidence of emotional distress was appellant's testimony that when he awoke from the fall he thought he was dead. That fear, however, was appellant's reaction to the emotional shock of the accident. It was not the type of emotional distress which results from a substantial physical injury. Accordingly, the trial court properly ruled that the record in this case did not contain evidence of compensable emotional distress.

Finally, appellant claims that the trial court erred in failing to set aside the jury's verdict. He points out that the evidence he introduced at trial showed out-of-pocket expenses of $2,793, yet the jury returned a judgment of only $2,340. Because the jury failed either to award damages sufficient to cover his medical expenses or to compensate him for pain and suffering, future medical expenses, and lost earnings, appellant contends that the jury's verdict must be set aside as insufficient, inconsistent and contrary to the law. We disagree.

When a jury finds a particular quantum of damages, and the trial judge refuses to disturb the jury's findings on a motion for a new trial, an appellate court will order a new trial only when it is certain that the award is contrary to all reason. *Cunningham v. Connor,* D.C.App., 309 A.2d 500 (1973); *Ryen v. Owens,* 144 U.S.App.D.C. 332, 446 F.2d 1333 (1971); *Taylor v. Washington Terminal Co.,* 133 U.S. App.D.C. 110, 409 F.2d 145, *cert. denied,* 396 U.S. 835 (1969). After careful examination of the record, we find that this is not a case in which the jury's verdict was contrary to all reason. Accordingly, it is

ORDERED and ADJUDGED that the judgment below is affirmed.

Per Curiam.
For the Court:

/s/ ALEXANDER L. STEVAS
Alexander L. Stevas
Clerk of the Court

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

ARTHUR S. CURTIS, *Plaintiff*,

v.

FRANK S. PHILLIPS, INC., ET AL., *Defendants*.

Civil Action No. 539-74

Order

This matter comes before the Court on the Plaintiff's Motion for a New Trial. Plaintiff contends that the Jury's verdict is grossly inadequate and a product of improper compromise. It is further contended that the award was made pursuant to erroneous instructions.

In the instant case, as reflected by the record, it is apparent that the Jury performed its function under proper instructions and evidentiary rulings, and accordingly, resolution of the issues must stand. Under the total circumstances of the case the Jury appears to have determined the amount of damages to be awarded based largely on reasonably good sense and sound judgment. The case law in this jurisdiction makes it clear that the amount of damages to be awarded in a negligence case cannot be computed solely by any mathematical formula, but must be based upon all the facts and circumstances of the case. *Rankin v. Shayne*, 98 U.S. App. D.C. 214, at 215. Moreover, trial courts generally are reluctant to set aside jury awards for personal injuries on the grounds of either excessive or inadequacy of damages. See *Cunningham v. Conner*, 309 A.2d 500.

Further, as stated in *Rankin v. Shayne, supra*, "that though a verdict may have been a result of compromise, or mistake on the part of the jury, verdicts cannot be upset by speculation or inquiry into such matters."

The Jury tested the credibility of the trial testimony including that given by the Plaintiff as it related to lost earnings. In essence the Jury was the final judge of whether the injuries suffered by the Plaintiff so incapacitated him as to justify recovery for such loss. Apparently, the Jury came to the decision that the injury suffered by the Plaintiff was not of such a nature as to significantly impair Plaintiff's ability to actively pursue his chosen field of employment.

Under the total circumstances of the case it cannot be said with any degree of certainty that the ultimate verdict arrived at by the Jury was not reasonable and appropriate.

Accordingly, it is on this 20th day of April, 1977,

ORDERED, that the Plaintiff's Motion for a New Trial be hereby DENIED.

/s/ FRED L. MCINTYRE
Fred L. McIntyre
Judge